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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1497

DONALD M. HEAVRIN - - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

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No._____

DONALD M. HEAVRIN - - - - *Petitioner*

v.

KENTUCKY BAR ASSOCIATION - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, Donald M. Heavrin, respectfully prays that a writ of certiorari issue to review the decision in this case on January 3, 1979, by the Supreme Court of Kentucky. (Mandate, Appendix, p. 37-39).

OPINIONS AND ORDERS BELOW

The Supreme Court of Kentucky ordered the petitioner, Donald M. Heavrin, suspended from the practice of law for a period of two years. The original opinion of the Supreme Court of Kentucky was rendered October 31, 1978, and is found on pages 1-25 of the Appendix.[1] The Court will note that the opinion is not unanimous and that the Chief Justice joined in by one other Justice vigorously dissented. The peti-

[1] *Kentucky Bar Association* v. *Heavrin*, Ky., 573 S. W. 2d 916.

tioner, Donald M. Heavrin, timely petitioned the Supreme Court of Kentucky for a rehearing, and this petition was denied on January 3, 1979. (Appendix, pp. 37-38). An order staying the execution of the mandate was entered by the Supreme Court of Kentucky on January 8, 1979. (Appendix, p. 26).

The decision of the Supreme Court of Kentucky resulted from certain findings of the Board of Governors of the Kentucky Bar Association and these Findings are contained in the opinion of the Supreme Court of Kentucky, pages 2 through 9. The Trial Committee of the Kentucky Bar Association, which originally heard the charges against the petitioner, Donald M. Heavrin, rendered two opinions. The first opinion by a vote of 2 to 1 recommended that all charges against the petitioner be dismissed because the respondent, Kentucky Bar Association, had not complied with its own rules and, accordingly, the petitioner was denied due process. This opinion and dissent is found on page 31 of the Appendix.

The second opinion of the Trial Committee unanimously recommended that all charges against the petitioner be dismissed and this opinion is found on page 34 of the Appendix.

A companion civil case was involved in these proceedings. This case was styled *Citizens Fidelity Bank and Trust Company* v. *Donald M. Heavrin, et al.*, Jefferson Circuit Court, Chancery Branch, Second Division, #174698, Hon. James Hubbs presiding. Judge Hubbs rendered an opinion in this case exonerating the petitioner from any wrong doing. Judge Hubb's Findings of Fact and Conclusions of Law are found on page 38 of the Appendix.

The Appendix also includes certain excerpts from briefs filed by the respondent, Kentucky Bar Association, before the Supreme Court of Kentucky and certain excerpts from a pre-trial discussion held on March 10, 1977, before the Trial Committee.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on January 3, 1979. This Petition for Writ of Certiorari was filed within 90 days of January 3, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT OF QUESTIONS PRESENTED

I. Did the respondent, Kentucky Bar Association, and the Supreme Court of Kentucky deny the petitioner, Donald M. Heavrin, due process of law and equal protection of the law when it did not provide the petitioner, Donald M. Heavrin, with copies of the original complaints as required by the Rules of the Supreme Court of Kentucky relating to bar disciplinary procedures?

II. Did respondent, the Kentucky Bar Association, and the Supreme Court of Kentucky deny the petitioner, Donald M. Heavrin, due process of law and equal protection of the law when vague charges, without citation of specific disciplinary rules, were made against the petitioner, Donald M. Heavrin, and in reversing

findings of fact made by the lawfully appointed Trial Committee and by a State Circuit Judge without stating any reason for doing so?

PROVISION OF CONSTITUTION INVOLVED

The Constitution provision relative to the issues in this case is Amendment XIV, Section 1, United States Constitution:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

TIME AND PLACE WHEN QUESTIONS WERE FIRST RAISED BELOW

Question #1 relative to not having a copy of the actual complaints was raised in response to the correspondence from the KBA and before the Trial Committee of the Bar Association. (Appendix, pp. 49-50). Question #2 was raised at the beginning, as noted by Chief Justice Palmore (Appendix, p. 21), ". . . it makes me think that perhaps Heavrin had been right all along in insisting that from the beginning the charges were never sufficient." See also Appendix, pp. 23 and 24, dissent of Chief Justice Palmore. It was also raised in the answer to the formal charges (Appendix, p. 64).

STATEMENT OF THE CASE

At all times material, the petitioner, Donald M. Heavrin, hereafter referred to as Heavrin, was a duly licensed and regularly practicing attorney within the Commonwealth of Kentucky and a member of the bar of this Court.

He was charged with seven counts of unethical conduct by the respondent, Kentucky Bar Association, hereafter referred to as KBA.

At the time this controversy arose and now, Kentucky had an integrated Bar act. All and final authority was vested in the Supreme Court of Kentucky. So that this Court will not be confused, the Commonwealth of Kentucky, by constitutional amendment, changed its court structure during the pendency of these proceedings. Formerly, the Court of Appeals of Kentucky was the highest court whereas now it is the Supreme Court of Kentucky, and the Court of Appeals of Kentucky is an intermediate court between the Circuit Court and the Supreme Court. The Circuit Court is the trial court and is one of general jurisdiction. The Supreme Court of Kentucky will hereafter be referred to as S. Ct. of Ky.

The S. Ct. of Ky. has established the method and procedure for processing charges of unethical conduct against lawyers.

According to Rule 3.160(a) (hereafter SCR) of the Supreme Court of Kentucky (Appendix, p. 30), a disciplinary action is commenced when an aggrieved party files a complaint with the Executive Director of the Bar

Association. Upon receipt of the complaint the Executive Director is required to notify the attorney, who is in turn given fifteen days to either respond to the complaint or acknowledge receipt of the complaint.

When the attorney responds, his answer along with the complaint is forwarded to a body known as the Inquiry Tribunal.

The Inquiry Tribunal either dismisses the complaint or files charges against the attorney.

If the Inquiry Tribunal files charges the case is referred to a Trial Committee who hears evidence and files its findings with the Board of Governors of the Kentucky Bar Association. The Board of Governors without hearing any witnesses or receiving any evidence then votes at its monthly meeting on the innocence or guilt of the accused, and recommends punishment, if any.

If the accused is dissatisfied with the findings and the recommendations of the Board of Governors, he may petition the Supreme Court of the state for review.

Now, let us examine the facts of this case in light of the Kentucky Disciplinary Rules.

The true center of controversy in this case is James F. Donoghoe, a former client of Heavrin's. At the time Donoghoe employed Heavrin, he was a licensed practicing attorney in the state. He has subsequently been disbarred and sentenced to the penitentiary for forging his client's names to settlement checks. *Kentucky State Bar Association* v. *Donoghoe,* Ky., 486 S. W. 2d 703; *Kentucky Bar Association* v. *Donoghoe,* Ky., 497 S. W. 2d 937. However, in 1972 when Heavrin

was representing Donoghoe, none of this information had come to light.

At the outset, Donoghoe hired Heavrin to represent him in a case that was before the Jefferson Quarterly Court where a client of Donoghoe's had taken a warrant against him for writing a worthless check in the amount of Three Thousand Dollars. Heavrin had not previously known Donoghoe and took the case because Mr. Frank Haddad, a member of the Board of Governors, and later the President of the KBA, referred the case to him. In the case before the Jefferson Quarterly Court, Donoghoe had entered into an agreement with his clients wherein they loaned Donoghoe a portion of the proceeds of an accident settlement. Donoghoe in turn agreed to pay his clients nine percent on the money with the understanding that he would pay them the balance on demand or make installment payments when his clients needed additional money. His clients who lived in Pennsylvania requested a Three Thousand Dollar payment and when Donoghoe's check was returned marked "drawn on uncollected funds" the Pennsylvania clients, believing they had been hoodwinked obtained a warrant for his arrest.

There was a controversy about the terms and conditions of the agreement between Donoghoe and his Pennsylvania clients, but Heavrin advised Donoghoe he was not interested in contesting or enforcing the agreement, and stated he would not represent him unless he paid the people in Pennsylvania in full, (Appendix, p. 68).

When the case of uttering a worthless instrument was called in the Jefferson Quarterly Court, Donoghoe

paid his Pennsylvania clients Three Thousand Dollars in cash to cover the check that was the gravamen of the criminal prosecution, however, the clients demanded payment of all monies they had loaned Donoghoe. The Quarterly Court case was continued various times so Donoghoe could raise the money to pay his clients in full. Ultimately, the charges were dismissed because Donoghoe made restitution.

However, at the time the clients demanded full payment Donoghoe did not have any cash, but he had substantial assets and in order to raise the money necessary to satisfy most of this claim he sold Heavrin his personal jewelry valued at approximately One Hundred Thousand Dollars, with the provision he could repurchase the jewelry within thirty days. Donoghoe had several important cases pending that would generate enough money to enable him to repurchase his jewelry from Heavrin, and it was only a matter of time until Donoghoe would be in the black and have enough money to satisfy all of his creditor's claims (Appendix, p. 16).

Several weeks after Heavrin purchased the jewelry from Donoghoe, Donoghoe unexpectedly found Heavrin at the courthouse and gave him a check for Forty Nine Thousand Dollars drawn on his personal account to cover Heavrin's fee and to repurchase the jewelry (Appendix, p. 17).

On the way back to the office, Heavrin went to the bank and deposited the check. Shortly thereafter, Donoghoe came to his office and told Heavrin that his wife had written checks on his personal account to pay other creditors and he asked Heavrin to give him his

check back. When Heavrin advised Donoghoe he had already deposited the check, Donoghoe become very excited because this would cause the checks his wife had written to bounce.

Because Donoghoe had other money coming in within a few days, Heavrin not wanting to cause Donoghoe any further embarrassment, wrote a check to set aside Donoghoe's original check. Both of these checks were ultimately returned because they were "drawn on uncollected funds." Without explanation, the Kentucky Bar Association held this transaction caused the bench and bar to be held in disrepute.

A day or two later, Donoghoe received a check in the amount of One Hundred and Five ($105,000.00), which represented a partial settlement of a case where he was the executor of an estate, and the attorney for other individuals who had been injured in an automobile accident. Upon reecipt of this check, Donoghoe contacted Heavrin and had him meet him at the bank so Donoghoe could cash the check and repay Heavrin. The uncontroverted proof was that at the time this transaction occurred Heavrin believed that Donoghoe was entitled to fifty percent of the amount recovered or Fifty Two Thousand, Five Hundred Dollars ($52,500) as his attorney's fee in the case (Appendix, p. 70).

When Heavrin and Donoghoe arrived at the bank, Donoghoe's bank refused to cash the check telling him that it could not be honored because it was "drawn on uncollected funds."

Heavrin then took the check to his bank, cashed it and got Eleven Thousand Dollars ($11,000) which he

gave to Donoghoe, so that Donoghoe could provide his clients with the immediate cash they needed (Appendix, p. 17).

Heavrin also wrote Donoghoe a check for the money he and the other payees had coming so Donoghoe could pay his clients the balance of the money he owed them.

The rest of the money which constituted Donoghoe's fee was given to Heavrin by Donoghoe to repurchase the jewelry, to enable Heavrin to forward the balance owed by Donoghoe to his Pennsylvania clients, and to pay off other general creditors of Donoghoe's who were pressing for payment. Because Heavrin maintained his escrow account at the Bank of Louisville which was several blocks away, with Donoghoe's consent he temporarily deposited these funds in his personal account so that he would not have to walk across town with $40,000.00 cash in his pocket. Heavrin's client (Donoghoe) was present during these entire proceedings and authorized Heavrin to take every step that was taken. Upon Heavrin's arrival back at his office he wrote a check on his personal account so the money could be transferred to escrow. From these facts, the KBA held that Heavrin had unethically commingled Donoghoe's funds with his own.

The KBA also held that Heavrin made a misrepresentation to Mrs. Collie, an officer at his bank, about the authenticity of the endorsements. This conclusion will be discussed in greater detail.

Although the check that Heavrin cashed was fully endorsed, certified and completely negotiable under the Uniform Commercial Code as adopted by the State of

Kentucky, the KBA found that Heavrin was guilty of not protecting the other payees of the check because he cashed the check and delivered the proceeds to Donoghoe. Without citing any canon, case or precedent the KBA concluded that this held the Bench and Bar in disrepute.

The transactions concerning the cashing of this check occurred on Friday. Although no one in the banking community bothered to tell Heavrin about the situation, serious questions have been raised about the authenticity of the endorsements on this day. Finally, on Monday, Heavrin's bank refused to honor any checks drawn on the Ninety Four Thousand Dollars ($94,000) that remained in Heavrin's account, and the executive vice-president of Citizens Fidelity Bank, Dan Ulmer, called Heavrin and told him for the first time there was a question about the validity of the endorsements. Heavrin responded by calling Donoghoe and demanding an explanation (Appendix, p. 69). Donoghoe assured him that the endorsements were valid. Heavrin called the bank back and gave the vice-president the names, addresses and phone numbers of all payees he could remember, so the bank could make an independent investigation for itself. This fact weighed heavily in the Circuit Court's decision concerning who caused the loss (Judge Hubb's opinion, Appendix, pp. 38-39).

Later in the day, the vice-president of the bank called Heavrin back and told him that he had personally checked the endorsements, everything was okay and checks drawn against the money would be honored (Appendix, pp. 38-39).

Nine months later the bank discovered the endorsements had been forged by Donoghoe and sued Heavrin and the other payees of the check in a declaratory judgment action. The other payees whose endorsements were forged by Donoghoe did not crossclaim or file suit against Heavrin.

After a full-blown trial which lasted several days, the Circuit Court held that Heavrin had nothing to do with the forgeries and the loss was caused by the bank's own negligence (Appendix, 38-39).

While the declaratory judgment action was pending the director of the Kentucky Bar Association sent Heavrin a letter dated August 15, 1973 (Appendix, p. 41), stating a complaint had been filed against him, but there was no complaint in the envelope with the director's letter. Pursuant to SCR 3.180, a disciplinary proceeding can be deferred if the same issues are before a court of competent jurisdiction. In the instant case, the KBA action was held in abeyance. The Circuit Court rendered its opinion and Heavrin through his attorney sent a cover letter to the KBA along with a copy of the opinion (Appendix, p. 62).

At this point, it should be observed that the SCR 3.170 provides that the Director *shall* forward the complaint and answer to the Inquiry Tribunal and the Tribunal can either dismiss the complaint or file charges. There are no provisions in the rules for additional investigation or expansion of the charges.

Apparently, neither of these steps were taken because Heavrin never heard anything from the Inqury Tribunal. However, nine months later the Director of

the Bar Association in June, 1976, sent Heavrin another letter in which he repeated the allegations contained in the first letter, and made several new allegations (Appendix, p. 64). Again, he did not enclose a copy of any complaint that had been filed.

On June 21, 1976, Heavrin answered the letter, protested the missing complaint, and alleged that there were no objective standards in determining either guilt or punishment in a Bar Disciplinary proceeding (Appendix, p. 64). This time, the Inquiry Tribunal charged Heavrin and a Trial Committee was appointed. The Trial Committee after receiving briefs and hearing arguments of counsel held two to one that the Kentucky Bar Association did not follow its own rules and had denied Heavrin due process by not furnishing him a copy of the complaint (Appendix, pp. 31-33).

After the Trial Committee recommended the charges be dismissed because of the denial of due process, the Board of Governors remanded the case to the Trial Committee for recommendation on the merits and the Trial Committee found the petitioner not guilty by a vote of three to nothing on all charges (Appendix, pp. 34-36).

Thereafter the Board of Governors at its monthly meeting voted Heavrin guilty on four of the seven charges that were filed against him.

Heavrin petitioned the Supreme Court of Kentucky for review, and the majority of the court affirmed the findings of the Board of Governors with two Justices dissenting.

REASONS FOR GRANTING THE WRIT

I. Failure of Due Process

At the outset the KBA sent Heavrin a letter dated August 15, 1973 (Appendix, pp. 41-43), and the letter said, "Please accept this letter as a notice of a complaint filed against you pursuant to the provisions of RCA 3.160.[2] In accordance with this rule, you are given 15 days from the date of this letter to respond to the complaint."

Heavrin protested the fact that no complaint had been sent to him and when this case was before the Trial Committee. Mr. Damron, who was then representing the Bar Association, told the Trial Committee that they had received a letter from a reliable citizen, but they admitted that Heavrin had not been sent a copy of the letter. When this case reached the Supreme Court level, the Bar Association said for the first time that there were three sworn affidavits in addition to the letter that formed the basis of the complaint, and the KBA stated in its brief, "It has been the unwaivering position of the complainants that Respondent has absolutely no right whatsoever to see a copy of the actual complaint . . . " (Appendix, pp. 51-54).

It is petitioner's contention that the writ of certiorari should be granted because he has been denied due process of law and equal protection of the law.

Disbarment proceedings are quasi-criminal in nature. *In Re: Ruffalo,* 390 U. S. 544, 20 L. Ed. 2d 117,

[2]RCA means Rules of the Court of Appeals before the change in the Kentucky judicial structure.

88 S. Ct. 1222. While states have the power to control the practice of law, the power cannot be exercised so as to abrogate federally imposed rights. *Johnson* v. *Avery,* 393 U. S. 483, 21 L. Ed. 2d 718, 89 S. Ct. 747. A state may not act arbitrarily or otherwise violate a lawyer's constitutional right. *Spevack* v. *Klein,* 385 U. S. 511, 17 L. Ed. 2d 574, 87 S. Ct. 625.

A lawyer in a proceeding which will determine the lawyer's right to practice his profession is entitled to due process of law and a state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 1 L. Ed. 2d 796, 77 St. Ct. 752. *Konigsberg* v. *State Bar of California,* 353 U. S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722.

Procedural due process requires confrontation and cross-examining of those whose word deprives a person of his livelihood. *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175. In *Willner,* it was held that the petitioner was denied procedural due process when he was denied admission to the bar by the appellate division without a hearing on the charges filed against him before either the committee or the appellate division.

Other applicable language in *Willner* is:

> "But a 'full hearing'—a fair and open hearing—requires more than that . . . Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of

> their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."

Willner also says that procedural due process often requires confrontation and cross-examining of those whose words deprive a person of its livelihood. Remember, the petitioner, Heavrin, was not heard in person before the Board of Governors or by the S. Ct. of Ky. The S. Ct. of Ky. has reserved into itself all fact finding powers in a bar disciplinary case but it does seem reasonable and fair and required by elementary constitutional law that where a fact finding body disturbs the facts found by another it should give some basis for doing so. This did not occur in the case here.

More disturbing is the fact that the Board of Governors of the KBA and the S. Ct. of Ky. refused to deal with or decide this basic constitutional question, although, it was clearly and forcefully made to the S. Ct. of Ky. by the petitioner, Heavrin. On page 47 of the Appendix, a portion of the KBA's brief before the S. Ct. of Ky. is set forth. KBA acknowledged that petitioner, Heavrin, raised two questions on procedural defects before the Court yet the Court in its majority opinion did not even discuss them. These questions were timely raised before the Trial Committee, argued and briefed before the Trial Committee, and there is no contention that these questions were not timely asserted and vigorously advanced by the petitioner, Heavrin.

Thus, right of due process here was violated because (a) the petitioner, Heavrin, was not given a copy of the actual complaint filed against him, and (b) the KBA's own rule required this to be done.

It may be argued the KBA's letter described the charges, but it is not sufficient because exculpatory material may have been contained in the letter the respondent, KBA, referred to in the hearing before the Trial Committee (Appendix, p. 49), and the same is true of the affidavits referred to in its brief before the S. Ct. of Ky. (Appendix, p. 51). It occurs that if a warrant based upon an affidavit issued to a defendant in a criminal matter and the proceeding lated resulted in an indictment before a grand jury the defendant would be entitled to a copy of the affidavit which caused the original issuance of the warrant leading to his arrest and later indictment. Suppose the chief prosecuting witness testified to something different at the trial than was contained in the affidavit in support of the warrant.

Suppose a judge says to a defendant, "You have been indicted for first degree murder," and the defendant demands to see the indictment and the request is refused. It would hardly suffice if the judge replied that the defendant had notice of the indictment and the charges and all he really needed to know was the name of the charge. We cannot imagine such a set of circumstances ever existing in a democratic society but it is exactly what occurred here.

One of the charges involved a very critical issue of fact and related to whether or not the petitioner, Heavrin, had made certain representations to an officer

of the Citizens Fidelity Bank. (See dissent of Chief Justice Palmore, Appendix, p. 13).

The Trial Court in the civil case had found that petitioner, Heavrin, had nothing to do with the forgeries or any conspiracy and the Trial Committee of the KBA acquitted Heavrin of these charges. The Bank officer testified in the civil trial and her testimony was considered by the Trial Committee. Apparently, the Trial Court nor the Trial Committee believed the bank officer because if either had then it could not have vindicated or acquitted the petitioner. Accordingly, if the bank officer was one of the affiants or the person who wrote the letter or signed the original complaint with the respondent, KBA, then anything such person may have said in the complaint, whether it was by letter or affidavits, would be vital on this precise issue. The failure to do this particularly when it is required by the respondent's own rule clearly denies petitioner, Heavrin, due process of the law. This whole proceeding is analogous to the situation where a lawyer is held before his licensing authority and told that unsubstantiated allegations about him have been brought to the attention of the authority and would he please explain all of his activities and vindicate his conduct.

We think *In Re: Ruffalo,* 390 U. S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 is applicable and controlling in this case and compels a conclusion that petitioner is entitled to the relief he seeks. In fact, it probably requires a summary reversal or vacating of the judgment of the S. Ct. of Ky.

Ruffalo was generally accused of soliciting FELA cases. After the proceedings had started, the charges were amended to include a charge that Ruffalo's investigator had investigated his own employer. The investigator was employed by the railroad. This charge was added after the proceeding commenced and Ruffalo was found guilty of the charge and suspended from practice in the Federal Courts of Ohio. The following language in Ruffalo is relative and in our judgment controlling:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. Ex parte Garland, 4 Wall 333, 380, 18 L. Ed. 366, 369; Spevack v. Klein, 385 U. S. 511, 515, 17 L. Ed. 2d 574, 577, 87 S. Ct. 625. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See In re Oliver, 333 U. S. 257, 273, 92 L. Ed. 682, 68 S. Ct. 499. It was said in Randall v. Brigham, 7 Wall 523, 540, 19 L. Ed. 285, 293, that when proceedings for disbarment are 'not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense.' Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.' Selling v. Radford, 243 U. S. 46, 51, 61 L. Ed. 585, 587, 37 S. Ct. 377.
>
> In the present case petitioner had no notice that his employment of Orlando would be considered a

disbarment offense until after both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.'

These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U. S. 1, 33, 18 L. Ed. 2d 527, 549, 87 S. Ct. 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh. How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

Petitioner understands that *Ruffalo* relates to the right of a disbarred lawyer to continue practicing in the Federal Courts.

In *Getty* v. *Reed,* 547 F. 2d 971, CA 6 Ky. 1977, the Sixth Circuit discussed disciplinary procedures for Kentucky lawyers. Although the opinion primarily relates to the question of when a Federal Court would entertain an action by a lawyer who had been disbarred by a State Court, it did use some very relevant and pertinent language.

"If, for example, the rules adopted by the Kentucky Court of Appeals had been such as to permit *filing of secret complaints* against lawyers and in camera hearings and disbarment as a result of said complaints without written statement of charges or opportunity for a public hearing and confrontation of witnesses and our current complainants had been disbarred in such a proceeding with final affirmation of that decision by the state's highest court, would there be doubt that under the Fourteenth Amendment and the supremacy clause the three-judge court would have 'jurisdiction?' We think not." (Emphasis added)

II. There Must Be Some Objective Standard Before the Mandate of Due Process-Equal Protection is Satisfied.

In answering the charges brought forth by the Inquiry Tribunal, Heavrin stated, "He is denied equal protection of the law because there are no objective standards in determinig guilt or punishment." Appendix, p. 64).

The majority of the court ignored this issue, but the dissenting justices dealt with this issue, and stated, "If the canons of ethics adopted for the legal profession were tested under the 'void for vagueness' doctrine which has spelled the doom of various breach of peace and disorderly conduct laws throughout the country, it is doubtful they would survive this case" (Appendix, pp. 23-34).

No other profession in the State of Kentucky is treated with such disdain. For example, in *Osborne* v. *Bullitt County Board of Education,* Ky., 415 S. W. 2d

607, the Kentucky Appellate Court held the charges against a teacher must be dismissed because they were insufficient. In *Armstrong* v. *Board of Civil Service Commission,* Ky., 48 S. W. 2d 1065, the Appellate Court said that it would zealously guard the rights of public employees to require charges for demotion or discharge to be very definite and certain. In *Hartman* v. *Board of Education of Jefferson County,* Ky., App., 562 S. W. 2d 674, the present Court of Appeals condemned the notice of demotion because it lacked specificity.

In *Konigsberg* v. *State Bar of California,* 353 U. S. 252, this Court struck down the vague qualification of "good moral character" as a prerequisite for admission to the bar. The petitioner submits the standard of "holding the bench and bar is disrepute" is equally vague and is, therefore, unconstitutional.

III. Before An Attorney's License Can Be Suspended He Must Be Guilty of Some Wrong Doing.

The Supreme Court in its majority opinion refers intermittently to all seven charges, even though Heavrin was acquitted by the Board of Governors on the first three. A careful reading of the opinion establishes that Heavrin was convicted of: (1) making a misrepresentation to Mrs. Collie at the bank, (2) commingling funds, (3) not protecting payees, and (4) exchanging checks.

(1) Misrepresentation to Mrs. Collie:

The Jefferson Circuit Court heard Heavrin and Mrs. Collie testify at great lengths and believed Heavrin, otherwise, it would have been impossible for the Circuit Court to have found in Heavrin's favor (Appendix, pp. 38-39).

A Trial Committee held two hearings, questioned Heavrin in detail and held, "There was no evidence of any unethical conduct in the cashing of the check" (Appendix, p. 14).

The Board of Governors, at its monthly meeting, then voted (in effect) that the Jefferson Circuit Court and the Trial Committee who heard the witnesses were incorrect in their assessment of the evidence, but neither the Board of Governors or the Kentucky Supreme Court explained how they reached this conclusion. In any other type of litigation, the findings of fact and conclusions of law by a fact finding body cannot be set aside unless the findings are clearly erroneous. This is Hornbook law.

Why would the majority of the Court automatically believe the bank is telling the truth and the lawyer is not? Do lawyers always lie and bankers always tell the truth? Moreover, this conclusion by the Board of Governors and the Supreme Court of Kentucky is inconsistent with the evidence.

The Board of Governors stated in its opinion:

> "Once having entered into this course of conduct the Respondent then devoted most of his energy to the protection of his own financial interests and not to the protection of the parties rightfully entitled to the funds (Appendix, p. 9).

If this be true, what interest was Heavrin protecting? Presumably, he was trying to persuade the bank

to cash the check so Donoghoe would have the money necessary to repurchase his jewelry. But if this was his motive, it was certainly inconsistent with his actions. When the bank was still holding $94,000.00 of the money, Dan Ulmer, the Executive Vice-President, called Heavrin and asked him about the endorsements. Heavrin told Ulmer about Donoghoe renting a plane to fly to Whitesburg to obtain the signatures of the other payees, and about seeing him off to Florida to obtain the endorsements of the Florida lawyer who was co-counsel on the case (Appendix, p. 16). Heavrin also called Donoghoe (Appendix, p. 68) and demanded an explanation, and called the bank back and gave the bank the names, addresses and phone numbers of all payees he knew about (Appendix, pp. 38-39).

Thus, the Board of Governors, and the Supreme Court of Kentucky have ignored the evidence and have set aside without reason or comment the conclusions of two competent fact finding bodies.

(2) Commingling Funds:

The majority's opinion on this issue disregards the fact that an attorney can commingle funds if his client gives him permission to do so. In the instant case, Donoghoe, who was Heavrin's client, was present at all times when the alleged commingling occurred, authorized every step that was taken, kept records of the transactions, was completely satisfied with Heavrin's representations, and never filed any complaints about the matter with the Bar Association.

In contrast to the instant case, and to further illustrate the lack of any objective standard, the petitioner cites *Ky. Bar Association* v. *Burroughs,* decided February 6, 1979, 26 KLS 2 (Appendix, p. 58), wherein Burroughs deposited his client's money in his attorney's account, and then lent the money without his clients knowledge to a third party to buy a truck. For this act and others Burroughs received a public reprimand.

In this case, Mr. Chief Justice Palmore's dissent dissects this issue with such force petitioner believes no further argument is needed.

(3) Failure to Protect Payees:

This allegation can best be characterized as unique. Donoghoe brought Heavrin a fully endorsed, certified check and asked him to cash the check. Presumably the Bar is complaining because Heavrin did not take the pro rata share that was due to each of the payees named in the check and delivered the money to them personally. This check was fully negotiable under the Uniform Commercial Code, and cashing it could not under any circumstances be violative of any code of ethics.

Following the Board of Governors thinking to its illogical conclusion, no two-party check could ever be cashed unless all parties were present to receive their pro rata share of the money. Otherwise, no person at the bank would risk cashing such a check because they would be held responsible if one payee absconded with all the money. Heavrin made every effort to see that everything was in order (Appendix, pp. 38-39).

(4) Exchange of Checks:

This transaction was totally harmless, no one was defrauded, no one lost a thing and neither the Board of

Governors nor the Supreme Court of the State is able to explain how this transaction violated any code of ethics. The dissenting opinion refers to the problems Alice had with the ruthless Queen of Hearts and accurately stated, " . . . the Board evidently convicted Heavrin first and then decided what it convicted him for. This may comport with due process but it makes me think that perhaps Heavrin had been right all along in insisting that from the beginning the charges were never sufficient" (Appendix, p. 21)

The petitioner believes the analogy to the Queen is correct and submits it is impossible to defend any type of case either factually or legally when the Queen is shouting, "First the verdict then the evidence."

In *Thompson* v. *City of Louisville,* 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624, a unanimous court accurately noted, "Just as 'conviction upon a charge not made' would be sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt."

In the present case, Heavrin plain and simple did nothing wrong, violated no canon of legal ethics, and is being arbitrarily punished. We would respectfully submit the mandate of *Thompson* is applicable to the case at bar.

CONCLUSION

If you read only the majority opinion, it would be impossible to determine what happened in this case, yet the Board of Governors' opinion is permeated with ominous sounding accusations and menacing descriptions. Every action and statement made by Heavrin has been construed as evidence of his guilt.

For example, the Board of Governors talks of Heavrin of being suspicious of Donoghoe and then proceeding without caution. In reality, Heavrin testified, "Well, I said in the deposition that, any time I have ever represented anyone in a criminal case, you always have some suspicions, and I have been suspicious of people that told me the absolute truth and I felt very confident about people who were lying to me. I had no more suspicion about him than I would someone who walked in this afternoon and told me their version of a criminal case . . ." (Appendix, p. 68).

We wonder how the Board of Governors would have construed the case if Heavrin said he was never suspicious of any of his clients and always accepted their word without doubt.

Thus, we have an attorney convicted of violating the canons of ethics when:

(1) The Bar Association commenced a disciplinary action against one of its member, and has had the audacity to argue that it does not have to show a copy of the complaint to the accused.

(2) The Board of Governors and the Supreme Court of the State have ignored the findings of two fact

finding bodies who exonerated the petitioner, without stating any reason for doing so.

(3) The Board of Governors and the Supreme Court have ignored all arguments relating to due process and equal protection, and have made no findings on either of these issues despite the fact they were exhaustively briefed. A motion for oral argument was made but it was denied.

(4) The conduct of the petitioner in this case was not unethical and neither the Board of Governors nor the Supreme Court have been able to cite any authority to support its conclusions.

In the history of Kentucky jurisprudence there has never been a dissenting opinion on the issue of guilt in a disciplinary case, and we sincerely hope this Court examines both the majority opinion and the dissenting opinion.

The April 10, 1978, edition of Time quoted the late Mr. Justice Tom Clark as saying disciplinary proceedings are "scandalous" because only small-time lawyers, without connections, are ever disciplined.

The case before this Court deals with an attorney who has diligently represented his clients for twelve years without regard to the popularity of the cause (e.g. *Pankey* v. *Commonwealth,* Ky., 485 S. W. 2d 513 and *Laing* v. *United States,* 423 U. S. 161, 46 L. Ed. 2d 416, 96 S. Ct. 473).

If Heavrin had researched the law every step of the way, he could not have found a single case from any jurisdiction condemning his conduct. Therefore, for the reasons stated herein, this Court should summarily

overturn the ruling of the Kentucky Supreme Court or alternatively grant certiorari so this case can be fully argued on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 1979, three copies of this Petition for Writ of Certiorari and accompanying separate Appendix were mailed, postage prepaid to Hon. Leslie Whitmer, Director, and Mr. Michael Hooper, Kentucky Bar Association, 403 Wapping Street, Frankfort, Kentucky.

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